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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1967

FRANK POAFPYBITTY, ET AL., PETITIONERS

v.

SKELLY OIL COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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Respondent obtained an oil and gas lease of certain Oklahoma land which petitioners, all of whom are American Indians, hold under trust patents issued by the United States. Some time after producing wells were brought in, petitioners brought a damage action against respondent in a State court, alleging that respondent had failed to exercise reasonable diligence to prevent the waste of gas produced under the lease, in violation of the terms thereof, and had thereby impaired petitioners' royalties. The Oklahoma Supreme Court sustained dismissal of the complaint on the ground that only the United States could sue to enforce petitioners' rights under the lease, and that peti-

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tioners thus lacked capacity to bring such an action (App. 61–69). At the Court's invitation, we expressed the view that that holding was unsound. Ceritorari was granted on October 9, 1967.

We submit this additional memorandum because, although any financial interest of the United States in the outcome of this case is remote,[1] the government has a special responsibility to prevent discrimination against its Indian wards and to vindicate their rights, procedural as well as substantive. In our view, the decision below unduly restricts the right of the Indians to seek judicial relief for claimed injury to their property rights and thereby improperly abridges their right of ownership.

A. *Petitioners have standing to institute this action.* Petitioners hold trust patents to the land here in question under the General Allotment Act of 1887 (24 Stat. 388, as amended, 25 U.S.C. 331 *et seq.*) and, in May 1947, executed an oil and gas lease to respondent on the form prescribed by the Department of the Interior (App. 1–2). The General Allotment Act provides for the issuance of trust patents on reservation lands suitable for farming to individual Indians, stipulating that the government holds the land in trust for the "sole use and benefit" of the allottees for a 25-year period, subject to possible extensions. 25 U.S.C. 348. By presidential order, the trust period has repeatedly

[1] Government liability might exist only if the dismissal of petitioners' present suit were affirmed, if, in a new action, petitioners were able to prove a case on the merits, and if they were further able to prove arbitrary and capricious action by administrative officials in the failure to bring suit in the name of the United States to enforce their damage claim.

been extended. The trust was imposed to prevent improvident alienations of the property by the Indians, who were the beneficial owners and who were authorized to use or lease the lands, subject to federal supervision.[2] Lease of such lands for mining purposes "by said allottee" is expressly authorized. 25 U.S.C. 396. Although the approval of the Secretary of the Interior is required, he is not the lessor and he cannot grant a lease on his own authority—except only in cases where heirs have not been determined or cannot be found (*ibid.*). Thus, the trust is not like a common-law guardianship or technical trust in which the guardian or trustee takes all action with respect to the property. As the Court of Appeals for the Ninth Circuit has observed: "The Federal-Indian relationship has many times been said to resemble that of guardian and ward. However, in the absence of some specific language to that effect in the treaty, the legal obligations of a true guardianship do not prevail." *Skokomish Indian Tribe* v. *France*, 269 F. 2d 555, 560.

As one would expect, those who can act for themselves can also sue on their own. The standing of allottees to maintain a suit is recognized in 25 U.S.C. 345, authorizing proceedings against the United States to establish the right to an allotment, and in 25 U.S.C. 347, providing that State statutes of limitations applicable to others apply in State or federal court actions

[2] In other instances, the same result is accomplished by issuance of fee patents containing restrictions upon alienation. The substantive result is the same, whichever method is used. See *Minnesota* v. *United States*, 305 U.S. 382, 389.

brought by allottees for possession, rents or profits of lands patented.[3] Accordingly, the courts have consistently recognized the right of Indians to institute judicial proceedings to protect their allotments. In *Heckman* v. *United States*, 224 U.S. 413, 445–446, in discussing the capacity of the United States to sue as to restricted Indian lands, this Court assumed that allottees could bring suits in their own right. And, more recently, in *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F. 2d 456, 460, the Court of Appeals for the Tenth Circuit concluded that prior decisions of this Court had established "the right of the restricted Indian, tribe, and pueblo to maintain such an action without the presence of the United States as a party." Accord, *Skokomish Indian Tribe* v. *France*, *supra*, 269 F. 2d at 560.[4]

It is no answer to say that an action like the present one may be instituted by the United States on behalf of the Indians. See *Heckman* v. *United States*,

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[3] See, also, Section 3 of the Act of April 12, 1926, 44 Stat. 239, 240, which provided a machinery whereby a party to a suit in which an Indian allottee was involved could cause the United States to be bound by serving notice of the action on the local Indian superintendent. While this particular statute applies only to the Five Civilized Tribes and, hence, is inapplicable here, it reflects the same legislative approach.

[4] While the *Seitz* and *France* cases involved Indian tribes, rather than individual Indians, this circumstance is unimportant. The discussion in *Seitz* applies equally to tribes or individuals, and the primary authority cited, the *Heckman* case, in fact involved individual Indians. See generally *Federal Indian Law*, 333–336 (G.P.O. 1958), which states (*id.* at 336): "[T]he rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands are clearly recognized, although the United States might not be bound by a judgment in such an action to which it was not a party."

supra. Indeed, there are many situations in which either the government or the private party immediately injured can initiate comparable suits. Civil antitrust litigation (see 15 U.S.C. 9, 15, 15a) and actions under the modern civil rights laws (*e.g.*, 42 U.S.C. 1971 (c), (d); 42 U.S.C. 2000e–5(e), 2000e–6) are sufficient examples. An even closer analogy is perhaps to be found in proceedings to vindicate the immunities of military personnel which may be initiated by the individual soldier (*e.g., California* v. *Buzard,* 382 U.S. 386) or by the United States in its own name (*e.g., United States* v. *Arlington County,* 326 F. 2d 929 (C.A. 4). Doubtless, in most circumstances where the rights of Indians are involved, the government can be counted on to file the necessary court action. But the right to sue—where it exists—should not be made to depend on the good judgment or zeal of government attorneys.

To be sure, the rule allowing an allottee to sue individually, without joining the United States, may theoretically expose the defendant to two suits, one by the Indian complainant and a second by the government.[5] But the risk is not very real since the private suit will usually eventuate only after the government has declined to file court proceedings. Moreover, it would be a rare case which the United States determined to relitigate in its own name. At all events, however, exposure to a second suit by the government

[5] That possibility is eliminated when the original action is filed by the government, because the United States is deemed to be asserting both its own interest and that of its Indian ward. See *Heckman* v. *United States, supra,* 224 U.S. at 444–445.

exists in other contexts—for instance under the anti-trust laws (see *United States* v. *Borden Co.*, 347 U.S. 514, 517, 520)—and has not been thought such an obstacle here as to justify denying Indians the right to sue alone. See *Choctaw and Chickasaw Nations* v. *Seitz, supra,* 193 F. 2d at 460–461; *Skokomish Indian Tribe* v. *France, supra,* 269 F. 2d at 560.

We conclude that the existence of federal control and supervision over allotted Indian property does not preclude the Indian landowners, like other property owners, from maintaining suits appropriate to the protection of their property rights.[6]

B. *Neither the oil and gas leasing regulations nor the lease terms preclude maintenance of an action by petitioners.* The United States has exercised its supervisory authority over the matter of oil and gas leasing in considerable detail. The critical fact, however, is that the Indian land-owners, not the United States, are the lessors here. If the lessee has conformed to all the requirements of the federal supervisor and has not committed any breach of the lease terms, the suit may fail; but that cannot defeat the capacity of the lessors to maintain an action.[7]

To be sure, the pertinent regulations empower the Secretary to cancel a lease for good cause "upon application of the lessor or lessee" or on his own motion.

[6] By Act of June 2, 1924, 43 Stat. 253, now 8 U.S.C. 1401 (a)(2), all native-born Indians are citizens.

[7] We express no view on the State-law issues regarding the proper form of actions, venue, or other procedural matters about which respondent argued at length in opposing certiorari (Reply Br. pp. 6–10). In light of the grounds upon which the holding below was based, it is unnecessary, at this juncture, to reach such issues.

25 C.F.R. 172.23. Yet, that does not purport to constitute the exclusive remedy available to lessors. Indeed, it would be remarkable if the severe sanction of cancellation were the only relief for all breaches of lease terms, or for any failure to pay rentals or royalties. Petitioner sought damages, not an administrative remedy. Accordingly, this case is not governed by the regulations—which provide only for relief at the hands of the Secretary.

Nor is the question resolved by the terms of the lease itself. Respondent invokes Section 6 of the lease, which provides that the Secretary may cancel "before restrictions are removed," and concludes, "Provided, That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of this contract by the lessee" (App. 7). There is no warrant, we submit, for implying by negative inference from this proviso a denial of any, or all, remedies otherwise existing prior to removal of government restrictions. The thrust of Section 6 is, rather, that after the restrictions are removed the Secretary will no longer have authority to cancel the lease. The proviso, fairly read, merely adverts to those remedies that will survive the termination of federal supervision because they have an independent source.

In sum, respondent's contention that, until the trusteeship is ended, the Indian landowners are disabled from maintaining suit for breach of a lease they have granted of their own property is unsupported in the governing statutes, the implementing regulations, or the terms of the lease.

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VERSUS

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT, SKELLY OIL COMPANY (Including Answer to Amicus Curiae Brief)

SKELLY OIL COMPANY, *Respondent*

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CONCLUSION

The judgment of the Supreme Court of Oklahoma should be reversed.

Respectfully submitted.

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DECEMBER 1967.

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